NO. 3038

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

CAROLINE J. ROBINSON,

Plaintiff-in-Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors under the Will of ELIZA ROY, deceased,

Defendants-in-Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

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CAROLINE J. ROBINSON, Plaintiff-in-Error, vs. LORRIN A. THURSTON and JOHN D. PARIS, Executors under the Will of ELIZA ROY, deceased, Defendants-in-Error.	*Error to the Supreme Court of the Territory of Hawaii.*

REPLY BRIEF FOR PLAINTIFF IN ERROR

The answer of defendants to the several contentions made in our opening brief in this cause, we find to be as follows:

1. That if a release be upon condition subsequent, the condition is void and the release absolute. (Brief, pp. 1-6.)

2. *In re Estoppel.* "The ratification by plaintiff of the transfers (of land) made by Mrs. Roy subsequent to the execution of the release * * * led

Mrs. Roy to believe * * * plaintiff no longer relied upon the clause in the release" * * * (Brief, p. 7.)

3. *In re Statute of Limitations.* "The statute of limitations would have no force or effect, if this court should sustain such a contention," viz: "that if Mrs. Roy at any time during her life, even if twenty years after the execution of the release, should mortgage or sell her property or incur an indebtedness of One Thousand Dollars ($1,000) the notes would immediately become due and payable." (Brief, p. 9.)

4. *In re Accord and Satisfaction.* "Mrs. Roy and plaintiff * * * came to an accord concerning the previous execution of the notes * * * and also came to a satisfaction" thereof. (Brief. p. 6.) "The agreement * * * could not * * * revive the notes," etc. (Brief. pp. 6 and 7.)

5. That the rules of law governing contracts in restraint of trade have application in this case. (Brief, pp. 16-24.)

6. "The mere fact that a party could, by paying a fine, avoid the restraint, would not validate the contract, and take it out of the rule that it is against public policy." (Brief, p. 21.)

7. It is not necessary to give notice of an intention to rely on the defense of illegality when the instrument—on the validity of which plaintiff must depend for judgment—is attached to the complaint. (Brief, p. 21.)

These several answers will be discussed in their order.

1. That if a release be upon condition subsequent, the condition is void and the release absolute. This contention of defendants was considered by the three Justices of the Supreme Court to be no longer, if it ever was, the law.

DISCUSSION OF AUTHORITIES CITED BY DEFENDANTS.

Fitzsimmons v. Ogden (7 Cranch 2, at 19, 3 Law Ed. 255).

In this case a stay of execution had been secured, and, as a writ of execution was issued before the date to which this stay was to run, the Court was forced to presume in favor of the regularity of the proceedings that a full release had been given. It will be noted that this fact is *presumed,* and that no release is actually before the Court. And the Court *after assuming that there was a full and regular release,* says it could not be avoided at law by a failure of one of the parties to perform an act in consideration of which it was given. There is no mention of a release upon condition subsequent, or the legal effect of such a release.

Kingsley v. Kingsley (20 Ill. 203 at p. 208).

A written release was given in this case, and its terms contained no reference to a condition of any kind. The most that can be said, and the Court so states, is that the parties may have *orally* understood that a third party was to endorse the notes. There being no condition in the release, the Court had no option but to declare the release absolute.

"A release by its own operation extinguishes a pre-existing right, and cannot be controlled or explained by parole." *Sherburne v. Goodwin* (44 N. H. 271-277).

In *Byrd Printing Co. v. Whitaker Paper Co.* (70 S. E. 799, 135 Ga. 865, 22 Ann. Cas. 1912A 182), the Court held that the agreement "was not a mere agreement of accord which would become satisfaction * * * upon the performance of the agreement, but was itself a complete accord and satisfaction." The Court then said that the proper procedure was a suit on the check and not on the original obligation, which had been discharged by the agreement. We find no mention of a condition of any kind on the happening of which the parties were to be restored to their former status.

In *Tyson v. Dorr* (1841, 6 Whart. (Pa.) 255, 262, 3) the Court first held that the condition annexed to the release was impossible of performance, after which the Court cited, as an additional reason for holding the condition void, a side-note by the author, Preston, in his work entitled "Sheppard's Touchstone by Preston," vol. 2, 325. But a careful reference to Coke's Inst. 1, 274-b, upon which Preston relied, does not show that it is an authority for the assertion of the author Preston. And, indeed, on page 323 we find a statement by the older author Sheppard which appears to be in conflict with the later author, Preston.

But regardless of the apparent inconsistencies of the last mentioned work,—we may note that *Tyson v.*

Dorr, an American case, was decided in 1841, and relies upon a side-note in a work on English law published in 1821.

After these dates we find that the highest courts of England held that a release upon condition subsequent was avoided by the breach of the condition. *Newington vs. Levy,* 1870, 5 L. R. C. P. 607; and on appeal, 6 L. R. C. P. 180; *Hall v. Levy,* 1875, 10 L. R. C. P. 154. Other authorities to the same effect are: Addison on Contracts, vol. 2, pt. 2, 836 and 838; *Belshaw v. Bush,* 11 C. B. at p. 201; *Whitney v. Whitaker,* 1841, 2 Met. 268; *Kingan v. Gibson,* 1870, 33 Ind. 53.

2. *In re Estoppel.* "The ratification by plaintiff of the transfers (of land) made by Mrs. Roy subsequent to the execution of the release * * * led Mrs. Roy to believe * * * plaintiff no longer relied upon the clause in the release." (Brief. p. 7.)

This point also was raised by defendants in the Supreme Court and received no mention by the Justices in their several opinions.

A sufficient answer to this contention is that nowhere in the transcript is there evidence that Mrs. Roy was "led to believe" that plaintiff would no longer rely upon the agreement.

"It is necessary to establish not only the fact of misrepresentation or concealment, but also * * * *that it has actually misled him.*" (Bigelow on Estoppel, 6th Ed., 604.)

Far from leading Mrs. Roy to believe she would no longer rely on the agreement, the fact, as shown

in the evidence, is, that plaintiff "took the first steamer that left here" (Transcript, p. 11) for Kona (where Mrs. Roy lived) and said to her mother, "You have broken our agreement." (Tr., p. 12.) And before ratifying the deed from Mrs. Roy to Willie Roy, insisted that her two sisters, Mrs. White and Mrs. Wall, and Willie Roy, be treated "alike, and share and share alike." (Tr., p. 9.)

Moreover, even if the fact had been shown that plaintiff waived the condition which provided that if Mrs. Roy conveyed land without plaintiff's consent the notes and mortgages were to be revived—how could a waiver of such condition induce Mrs. Roy to break the other condition, viz.: to incur an indebtedness in excess of $1,000? But as a fact what plaintiff did was to ratify, *for the benefit of the grantee,* as all ratifications are, the deed which Mrs. Roy gave him, and which was defective by reason of the existence of the mortgages which plaintiff held over the land conveyed.

3. *In re Statute of Limitations*: "The Statute of Limitations would have no force or effect, if this Court should sustain such a contention," viz: "that if Mrs. Roy at any time during her life, even if twenty years after the execution of the release, should mortgage or sell her property or incur an indebtedness of One Thousand Dollars ($1,000) the notes would immediately become due and payable." (Brief, p. 9.)

Counsel made this same contention in the Supreme

Court, but we do not find that the several justices agreed with them.

In our view of the law on this point, it would be reasonable and legal for Mrs. Roy to make an agreement to pay a certain sum of money at any time within her life time. In and by the terms of said agreement, Mrs. Roy admitted the several debts to be "now due and payable to the said Caroline J. Robinson, and doth hereby agree that in case of the violation by her of her said above agreement and covenant, or any part thereof, then and in such case the said indebtedness principal and interest, shall be and become immediately due * * *." The question then, is, what is the relation between such an agreement and the Statute of Limitations? The answer is that the statute has nothing whatever to do with such an agreement until the date when something becomes due under the agreement.

"When the payment of a claim or the liability of a party is made dependent upon the performance of any condition precedent or the happening of any contingency, a right of action does not accrue or the statute begin to run, until the performance of such condition, or the happening of such contingency." (*Segelken v. Hawaiian Trust Co.*, 20 Haw. 225, 229.)

The breach of the condition as to indebtedness occurred "shortly before her (Mrs. Roy's) death," and *at that time* the Statute of Limitations began to run.

Defendants also state that when this agreement was made (1905) the notes were "outlawed." This statement is gratuitous and appears to be made by

a calculation of dates without taking into account the transactions of the parties.

Moreover, defendants in their answer in the trial court gave notice of their intention to rely on the statute of limitations—and we find no evidence introduced by them to support their contention. For all that appears in evidence then, Mrs. Roy's obligations (prior to the time this agreement was made) may have been kept in full force and effect by new promises to pay, just like the new promise made in this agreement.

And a new promise to pay an admitted obligation, will take the case out of the Statute of Limitations. *Davis v. Mills,* 21 Haw. 167; 25 Cyc. 1067, 1328; 1359; and a moral obligation to pay a debt is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is complete. 25 Cyc. 1329.

4. "Mrs. Roy and plaintiff * * * came to an accord concerning the previous execution of the notes * * * and also came to a satisfaction" thereof. (Brief, p. 6.) "The agreement * * * could not * * * revive the notes," etc. (Brief, pp. 6 and 7.)

This is a further point raised by counsel for defendants in the Supreme Court and not mentioned in the several opinions of the Justices.

Where, by the terms of an agreement, there is an express promise by the debtor to pay the old indebtedness on the happening of a future event, and such

event occurs, an action brought thereafter by the creditor on the old indebtedness will lie.

Whitney v. Whitaker, 2 Met. 268;
Kingan v. Gibson, 33 Ind. 53;
Simmons v. Oullahan, 75 Cal. 508;
Hall v. Levy, supra.

In the case at bar a suit on the original obligations was the proper procedure. *Whitney v. Whitaker,* supra; *Kingan v. Gibson,* supra.

Moreover, an accord and satisfaction is a substitution by agreement of the parties of something else in place of the original claim, which *when executed* extinguishes the antecedent liability. (*Boston Mining Co. v. Orme* (Colo.), 71 Pac. 885.) But an accord is *executory* so long as something remains to be done in the future. (*Bragg v. Pierce,* 53 Me. 65.) And it is sufficiently executed only *when all is done* which the party agrees to accept in satisfaction of the pre-existing obligation. (See *Kingan v. Gibson,* supra.)

5. That the rules of law governing contracts in restraint of trade have application in this case. (Brief, pp. 16-24.)

In our opening brief (pp. 10 to 18) we attempted to show that the rules of law governing restraints of trade owe their origin to mercantile usage and the interest of the public in seeing that no man is unreasonably restrained from pursuing his trade or calling—and that such rules, adopted for such a purpose, can have no application in a simple contract between an elderly lady and her daughter.

The subject of unlawful agreements is too complex to permit of a studied analysis in this brief. We will therefore refer the Court to Wald's Pollock on Contracts, 3rd Ed., by Williston, page 370, wherein this subject is carefully considered.

It will be noted that the author classified unlawful agreements in the following order:

A. Agreements contrary to positive law—wherein are considered contracts to commit offenses, and contracts prohibited by statute, etc.;

B. Agreements contrary to good morals; wherein contracts having to do with illicit cohabitation and agreements tending to separate married couples, etc., are considered;

C. Agreements contrary to public policy, wherein are considered

(a) Public policy as to external relations of the State (p. 426);

(b) Public policy as touching internal government (p. 434);

(c) Public policy as to legal duties of individuals (p. 461);

(d) *Public policy as to freedom of individual action* (p. 464).

"As to agreements *unduly* limiting the freedom of individual action.

"There are certain points in which it is considered that the choice and free action of individuals *should be as unfettered as possible. As a rule a man may bind himself to do or omit,* * * * anything which the *law does not forbid to be done or left undone.*

The matters as to which this power is specially limited on grounds of general convenience are:

"(a) Marriage.
"(b) Testamentary dispositions.
"(c) Trade." (P. 464.)

Agreements in restraint of trade are carefully considered on pages 467 to 481. And with respect to all such agreements it must be observed that they have to do with the sale of a *trade* or *business* and a covenant by the vendor as to his freedom of individual action with respect to such trade or business thereafter. The public is interested in seeing that a skilled artisan, tradesman, or mechanic is not unreasonably restricted in following his occupation, and has therefore established rules of law to govern contracts in restraint of trade.

So we may safely conclude that while the contract in the case at bar is subject to the rule that " a man may bind himself to do or omit. * * * anything which the law does not forbid to be done or left undone" (Wald's Pollock, supra, p. 464), it is not to be considered in the light of the special *limitations* upon that rule which have to do with "Marriage, Testamentary dispositions and Trade." (Id., 464.)

A further matter to be considered is the modern attitude of the highest courts toward that indefinite quantity known as "public policy."

"The question is, in effect, whether it is at the present time open to courts of justice to hold transactions * * * void simply because in the judgment of the Court it is against the public good that

they should be enforced, although the grounds of that judgment may be novel. *The general tendency of modern ideas is no doubt against the continuance of the jurisdiction.*" (Wald's Pollock, supra, p. 421.)

"The prevailing modern view is expressed by the following remarks of the late Sir G. Jessel (Id., p. 425), which remarks have been approved by the Supreme Court of the United States. (See our opening brief, pp. 22 and 23.)

"The wide discretion formerly claimed by the judges in the somewhat analogous field of the law of conspiracy has been finally discredited by the House of Lords as well as the Court of Appeal in the Mogul Steamship Co.'s case." (Wald's Pollock, supra, p. 426.)

All of which leads us to the conclusion that "Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own." (*Daley v. People's B. & L. & S. Assn.*, 1901, 178 Mass. 13, 19.)

6. "The mere fact that a party could, by paying a fine, avoid the restraint, would not validate the contract, and take it out of the rule that it is against public policy." (Brief, p. 21.)

We are inclined to agree with this statement, viz: that if a restraint is in and of itself against public policy "the mere fact that a party could by paying a fine, avoid the restraint, would not validate the contract," etc.

But counsel, in seeking to show that a restraint attached to a contract is illegal, cite as authority a case wherein a condition is attached to a grant of a

fee simple title to land, and argue that because in such case the condition was declared bad, the same reasoning may be used in the case at bar. But this does not follow. For as was said in the case cited (*De Peyster v. Michael,* 57 Am. Dec. 471), "a condition" attached to a grant of a fee "is void on the ground that it is repugnant to the estate granted"; that is, if the condition could stand, the estate granted would not be a fee. The court in the cited case did not say that such a condition, if annexed to a private contract, would not be good,—but only that if annexed to the grant of a fee, it is bad.

7. It is not necessary to give notice of an intention to rely on the defense of illegality when the instrument—on the validity of which plaintiff must depend for judgment—is attached to the complaint. (Brief, p. 21.)

Let us assume A made a contract with B, whereby A is to pay B $25 if he will hang X. B sues A for the $25, attaching a copy of the contract to the complaint, and alleging performance. May B succeed in his action?

On its face this appears to be an illegal contract, but unless A pleads illegality B has no chance to show all the facts of the case. The facts may be that A is the acting executioner for the Territory; that X is sentenced to be hanged, and A wanted B to perform A's duty. Is B to be required to introduce every conceivable kind of evidence to meet every conceivable kind of defense that A may rely on—

before he, B, can rest his case? This does not seem fair, and certainly does not tend to aid in the speedy conduct of trials in Courts of Justice.

Rather than proclaim such an unjust rule, the Court in *Pahia vs. Maguil* held that even though from evidence adduced it appeared that plaintiff's services were of an illegal nature,—yet defendant not having given notice of his intention to rely on the defense of illegality (and thereby giving plaintiff an opportunity to show, if she could, matter in avoidance of such plea),—the judgment was for the plaintiff.

This point, however, was fully covered in our opening brief.

Counsel repeatedly mention the fact that the original amount due under the notes was $5875, and that this amount has been materially increased by interest additions. But is it a hardship upon a mortgagor to pay back money borrowed—which he has had the use of for a long period of time—with interest? As Justice Coke has said in his opinion, "the commerce of the world is conducted largely on credit"—and it should be remembered that commerce could not have been developed had not the law carefully and consistently protected the rights of creditors not only as to the principal sum due, but to interest thereon as well.

For the reasons given in this and our opening brief, it is submitted that an order should be entered directing the Circuit Court of the First Judi-

cial Circuit to set aside the judgment heretofore entered on behalf of the defendants-in-error, and to enter a judgment in favor of the plaintiff-in-error.

Respectfully submitted,

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Dated at Honolulu this
1st day of October, 1917.